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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/497,836	02/03/2000	Victor S. Moore	BC9-99-044	7966

23334 7590 07/22/2005

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EXAMINER
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FLYNN, KIMBERLY D

ART UNIT	PAPER NUMBER
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2153

DATE MAILED: 07/22/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

**Application No.**

09/497,836

**Applicant(s)**

MOORE ET AL.

**Examiner**

Kimberly D. Flynn

**Art Unit**

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 23 May 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-18 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-18 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

### DETAILED ACTION

1. This Action is in response to an After Final Amendment filed May 22, 2005. Claims 1-18 are presented for further consideration.

#### *Response to Arguments*

2. Applicant's request for reconsideration of the finality of the rejection of the last Office action is persuasive and, therefore, the finality of that action is withdrawn.
  - Applicant's arguments filed May 22, 2005 in regard to the rejection under 35 U.S.C. 103(a) as being unpatentable over Welles in view of Yao have been fully considered but they are not persuasive.
  - In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Examiner maintains that the combination of Welles and Yao teach the claimed limitations and that there is sufficient motivation to combine the two systems.

*Affidavit*

3. The declaration under 37 CFR 1.131 filed March 22, 2005 is insufficient to overcome the rejection of claims 1, 3-4, 11, 13-14, 16, and 18 over Welles, II et al. (U.S. Patent No 6,532,495) in view of Yao et al. (U.S. Patent No. 5,938,734) and claims 5, 10, and 15 over Welles in view of Huizer et al. (U.S. Patent No. 6,751,802) under 35 USC § 103(a) as set forth in the last Office action dated May 23, 2005 because it is not properly executed and fails to establish reduction to practice prior to the date of the reference.

**I. Formalities:**

- The affidavit is ineffective because it was not properly executed. It is not signed by all of the inventors. MPEP 715.04 states the following:

**WHO MAY MAKE AFFIDAVIT OR DECLARATION**

The following parties may make an affidavit or declaration under 37 CFR 1.131:

(A) All the inventors of the subject matter claimed.

(B) An affidavit or declaration by less than all named inventors of an application is accepted where it is shown that less than all named inventors of an application invented the subject matter of the claim or claims under rejection. For example, one of two joint inventors is accepted where it is shown that one of the joint inventors is the sole inventor of the claim or claims under rejection.

(C) If a petition under 37 CFR 1.47 was granted or the application was accepted under 37 CFR 1.42 or 1.43, the affidavit or declaration may be signed by the 37 CFR 1.47 applicant or the legal representative, where appropriate.< .

(D) The assignee or other party in interest when it is not possible to produce the affidavit or declaration of the inventor. Ex parte Foster, 1903 C.D. 213, 105 O.G. 261 (Comm'r Pat. 1903).

Affidavits or declarations to overcome a rejection of a claim or claims must be made by the inventor or inventors of the subject matter of the rejected claim(s), a party qualified under 37 CFR 1.42, 1.43, or 1.47, or the assignee or other party in interest when it is not possible to produce the affidavit or declaration of the inventor(s). Thus, where all of the named inventors of a pending application are not inventors of every claim of the application, any affidavit under 37 CFR 1.131 could be signed by only the inventor(s) of the subject matter of the rejected claims. Further, where it is shown that a joint inventor is deceased, refuses to sign, or is otherwise unavailable, the signatures of the remaining joint inventors are sufficient. However, the affidavit or declaration, even though signed by fewer than all the joint inventors, must show completion of the invention by all of the joint inventors of the subject matter of the claim(s) under rejection. In re Carlson, 79 F.2d

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900, 27 USPQ 400 (CCPA 1935).

- Applicant has not met any of the criteria above, therefore; the affidavit is ineffective on its face.

## **II. Showing Prior Invention**

- The affidavit is ineffective because it was not properly executed. It does not satisfactorily show reduction to practice. MPEP 715.07 states the following:

### **THREE WAYS TO SHOW PRIOR INVENTION**

The affidavit or declaration must state FACTS and produce such documentary evidence and exhibits in support thereof as are available to show conception and completion of invention in this country or in a NAFTA or WTO member country (MPEP § 715.07(c)), at least the conception being at a date prior to the effective date of the reference. Where there has not been reduction to practice prior to the date of the reference, the applicant or patent owner must also show diligence in the completion of his or her invention from a time just prior to the date of the reference continuously up to the date of an actual reduction to practice or up to the date of filing his or her application (filing constitutes a constructive reduction to practice, 37 CFR 1.131).

As discussed above, 37 CFR 1.131(b) provides three ways in which an applicant can establish prior invention of the claimed subject matter. The showing of facts must be sufficient to show:

(A) reduction to practice of the invention prior to the effective date of the reference;  
or

(B) conception of the invention prior to the effective date of the reference coupled with due diligence from prior to the reference date to a subsequent (actual) reduction to practice; or

(C) conception of the invention prior to the effective date of the reference coupled with due diligence from prior to the reference date to the filing date of the application (constructive reduction to practice).

- Applicant does not appear to be attempting any of these modes. Applicant attempts to establish prior invention by showing Reduction To Writing of the invention prior to the April 27, 1999, the effective filing date of Welles. Applicant is reminded that Reduction To Writing is not equivalent to Reduction to Practice.
- Proof of actual reduction to practice requires a showing that the apparatus actually existed and worked for its intended purpose.

Accordingly, applicant has not established prior invention. The rejection is maintained.

***Claim Rejections - 35 USC § 103***

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. Claims 1, 3-4, 11, 13-14, 16, and 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Welles, II et al. (U.S. Patent No 6,532,495) in view of Yao et al. (U.S. Patent No. 5,938,734).

In considering claims 1, 6, and 11, Welles discloses a method for transmitting data from a server to a requesting computer, the method comprising the steps of:

receiving a request for a specified data item at the server(col. 6, lines 60-65), the specified data item to be delivered in its entirety prior to being accessed (well known feature of FTP file transfers, wherein the applicant discloses that the request can be a FTP request)

receiving a speed indication signal at the server from the requesting computer wherein the speed indication signal comprises an indicated speed of transmission (col. 7, lines 5-16); and

While the system taught by Welles discloses the invention substantially as claimed it does not disclose the step of limiting an average rate of transmission of at least a portion of the data item across a data link to the requesting computer to be not greater than the indicated speed, wherein the indicated speed is less than the data rate of the data link and less than the data rate capacity of the requesting computer. However, this is merely the well known leaky bucket or

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Generic cell rate algorithm which is a data packet policing policy used to guarantee that the traffic matches the negotiated connection that has been established between the user and the network. The variables of the GCRA include (L=limit and I= interval), wherein the sum of the intervals match the limit.

Yao whose invention is a real time stream server for handling a plurality of real time stream data with different data rates discloses that when the maximum data rate is received (input or dedicated speed) a number of unit streams or blocks are determined or based on this maximum rate (col. 5, lines 66-67 through col. 6, lines 1-5). Yao further discloses that the scheduling unit carries out scheduling including the selection of the transfer start timings for the unit streams (blocks) wherein each one of the unit streams (blocks) are scheduled as an independent unit stream for which the block transfer time for one block is scheduled according to the block transfer period, the block size, the time-slot interval, and the block transfer time. Accordingly the real time data stream is read out with a data rate not greater than the maximum rate based on the schedule (col. 7, lines 33-67 through col. 8, lines 1-5).

Therefore, it would have been obvious to one skilled in the art to incorporate and implement the aforementioned steps of dividing or limiting the stream resources into amounts corresponding to the unit streams and allocate according to a data rate of each real time stream so that it becomes possible to utilize the stream resources efficiently without wasting resources.

In considering claims 2, 7, and 12, the combined system of Welles and Yao discloses the limiting step comprising the sub steps of:

determining a block size based at least on the average transmission rate; determining a period based at least on the average transmission rate (see Yao col. 12, lines 18-25); and

transmitting a plurality of blocks of data, each of the blocks having a block size and being transmitted at intervals substantially equal to the time period (see Yao col. 12, lines 37-42);

In considering claims 3 and 13, the combined system of Welles and Yao discloses a method further comprising the steps of:

accessing a remote computer indicated in an address included in the request, wherein the remote computer is not one of the server and the requesting computer. and receiving the first data from the remote computer (see Welles, col. 6, lines 56-65, see also figs. 3A( subscriber system), 3B(ISP system), and 3C (Broadcast channel provider system))

In considering claims 4 and 14, the combined system of Welles and Yao discloses a method further comprising the steps of reading the data item from a memory associated with the server (see, Welles, fig. 3B, (Memory (127), includes download filed (101)).

In considering claim 8, the combined system of Welles and Yao further discloses a method further comprising the steps of:

accessing a remote computer indicated in an address included in the request, wherein the remote computer is not one of the server and the requesting computer; and receiving the first data from the remote computer (see Welles, col. 6, lines 56-65, see also figs. 3A( subscriber system), 3B(ISP system), and 3C (Broadcast channel provider system))

In considering claim 9, the combined system of Welles and Yao further discloses a method further comprising the steps of reading the data item from a memory associated with the server (see, Welles, fig. 3B, (Memory (127), includes download filed (101)).

In considering claims 16-18, Yao further discloses wherein the transmission rate is not related to a speed that is associated with the specified data item (see Yao col. 5, lines 37-45).



6. Claims 5, 10, and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Welles in view of Huizer et al. (U.S. Patent No. 6,751,802; hereinafter Huizer).

In considering claims 5, 10, and 15, Welles discloses a method for transmitting data from a server to a requesting computer, the method comprising the steps of: accepting a user request for a specified data item at a client computer (col. 6, lines 60-65), the specified data item to be delivered in its entirety prior to being accessed (well known feature of FTP file transfers, wherein the applicant discloses that the request can be a FTP request)

accepting a user input speed setting at the client computer (col. 7, lines 5-16); and

While the system taught by Welles discloses the invention substantially as claimed it does not disclose the step of limiting an average rate of transmission of at least a portion of the data item across a data link to the requesting computer to be not greater than the indicated speed. However, this is merely the well known leaky bucket or Generic cell rate algorithm which is a data packet policing policy used to guarantee that the traffic matches the negotiated connection that has been established between the user and the network. The variables of the GCRA include (L=limit and I= interval), wherein the sum of the intervals match the limit.

Yao whose invention is a real time stream server for handling a plurality of real time stream data with different data rates discloses that when the maximum data rate is received (input or dedicated speed) a number of unit streams or blocks are determined or based on this maximum rate (col. 5, lines 66-67 through col. 6, lines 1-5). Yao further discloses that the scheduling unit carries out scheduling including the selection of the transfer start timings for the unit streams (blocks) wherein each one of the unit streams (blocks) are scheduled as an independent unit stream for which the block transfer time for one block is scheduled according to

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the block transfer period, the block size, the time-slot interval, and the block transfer time.

Accordingly the real time data stream is read out with a data rate not greater than the maximum rate based on the schedule (col. 7, lines 33-67 through col. 8, lines 1-5).

transmitting the user request for a data item to a server computer (col. 7, lines 40-46);

While Welles discloses the system substantially as claimed, Welles does not disclose sending a sequence of pause transmission and resume transmission signals from the client computer to a server computer according to the schedule. Nonetheless, receiving a sequence of playback functions such as "pause" and "resume" to stop and continue a stream is well known as evidenced by Huizer. In similar art, Huizer discloses that allows a user to pause and resume playback of a video stream (col. 2, lines 48-50). It would have been obvious to modify the system disclosed by Welles to include a sequence of playback functions such as "pause" and "resume" to stop and continue a stream in order to give the user Video-on-Demand control of the stream. Therefore, the aforementioned limitations would have been an obvious modification.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kimberly D. Flynn whose telephone number is 571-272-3954.

The examiner can normally be reached on M-F 8:30 - 5:00.


If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Glen Burgess can be reached on 571-272-3949. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Kimberly D Flynn  
Examiner  
Art Unit 2153

KDF

  
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